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Statutory Rape Laws

Does it make sense to enforce them in an increasingly permissive society?

Statutory rape laws were enacted in the Middle Ages to protect the chastity of young women. Now they are emerging as the latest solution to the teen pregnancy problem, after a 1995 study by the Alan Guttmacher Institute found about two-thirds of teen mothers were impregnated by adult males.

In California, Gov. Pete Wilson announced in his 1996 state-of-the-state address that statutory rape is a crime that is going to be treated as such. The state allocated more than \$2 million to 16 jurisdictions to step up enforcement. The highest priority for prosecution were cases resulting in pregnancies and

those in which there was an age discrepancy of more than five years. Soon after, California passed a law stiffening penalties to include a \$25,000 fine and nine-year prison sentence for second-time offenders.

Some call these laws a relic of an oppressive past, while others think they promote family values. The positions of law professors Michelle Oberman, DePaul University-Chicago, and Richard Delgado, University of Colorado-Boulder, are more nuanced. Oberman thinks the laws must be recast as a weapon against coerced sex, while Delgado believes they will always be subject to selective enforcement.

Yes: The risk of psychological harm to girls is too great

In an era in which more than 50 percent of teens under age 18 are sexually active, it is inconceivable that we could incarcerate every person who has sex with a minor. Nonetheless, important reasons remain for enforcing, and even expanding, statutory rape laws.

These laws reflect a consensus that minors are not mature enough to make major decisions because they are vulnerable to coercion and exploitation. This concern permeates the law—minors may disaffirm their contracts, generally may not consent to their own health care, may not drink alcohol and cannot vote. Therefore, the real question facing those who see statutory rape laws as antiquated is whether minors are somehow better able to protect themselves in sexual encounters than they are in other adult endeavors. The answer from numerous sources is no.

Studies by the American Association for University Women demonstrate that, for girls in particular, adolescence is a time of acute crisis in which self-esteem, body image, academic confidence and the willingness to speak out decline precipitously. Psychologists studying girls' sexuality report that these combined sources of insecurity, coupled with the perceived importance of being attractive to males, lead many girls to look to males for validation. In short, they try to fulfill their emotional needs through sex.

What this means is that many girls consent to sexual relationships that we, as a society, can and should recognize as exploitative. Traditional rape laws, focusing on lack of consent, do nothing to combat the problem of the 14-year-old girl who says yes to a 33-year-old neighbor because sleeping with an adult makes her feel im-

portant, or who says yes to a classmate who threatens to spread rumors about her unless she sleeps with him, or who says yes to several boys because they took her out.

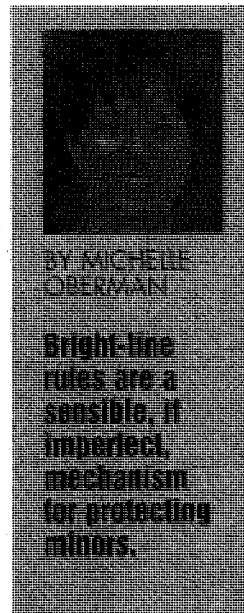
Such encounters often result in permanent harm to girls through depression, disease and pregnancy. The very real harms girls suffer by "consenting" to sexual exploitation provide ample justification for laws that penalize those who would prey upon them.

Most modern statutory rape laws are gender-neutral and impose criminal liability only if the "victim" is under the age of consent and the partner is older by anywhere from two to five years or more. Bright-line rules are a sensible, if imperfect, mechanism for protecting minors, since there are valid reasons to suspect coercion when a girl 15 or younger has a partner 18 or older.

However, despite their usefulness, these statutes ignore the many exploitative sexual encounters between minors of similar ages. Moreover, the failure to men-

tion coercion, coupled with the fact that age-disparate sexual unions are commonplace, yields little guidance for enforcement. Absent an explicit focus on coercion, these laws invite selective, discriminatory enforcement.

Instead of abolishing statutory rape laws, we ought to consider how to refine them. In doing so, we must remain cognizant of the harm we seek to prevent. The "wrong" committed by coercing a minor exists independently of teen pregnancy. Although no legal solution will eliminate the risks inherent in sexual activity and allow girls to come of age safely, the law has a critical role to play in setting predatory sexual behavior off-limits.



When the Law Says No

- 1275** English common law criminalizes statutory rape—sex between a man and a woman below the age of consent, which was first set at the age of 12 years.
- 1576** Common law age of consent lowered to 10 years.
- 1700s-1800s** Statutory rape at common law adopted in the United States. States set the age of consent at 10 or 12 years.
- 1885-1900** Most states and territories raise the age of consent to 16-18 years.
- 1981** In *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, the U.S. Supreme Court upheld California's gender-specific statutory rape law, which had been challenged on equal protection grounds.
- 1993** California make its statutory rape law gender-neutral.
- 1996** By now, statutory rape laws in 35 states are gender-neutral. Most impose penalties only if there is a two- to five-year disparity between the ages of the perpetrator and the underage party.

Source: ABA Journal research

No: Selective enforcement targets 'unpopular' men

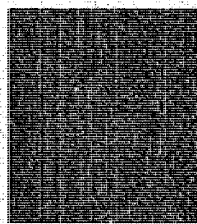
Except in the case of the very young, who of course should be protected from sexual predators, statutory rape laws are a bad idea. Most such laws provide that anyone who has sex with someone younger than a certain age—frequently 16—is guilty of the crime of rape, since an underage partner is unable to give valid consent. These laws can only be applied unevenly—and they are.

Consider: Recent surveys show the median age of first intercourse for women in the United States is 17 years and a few months; for boys, it is a little lower. This means that a high percentage of young women are victims of statutory rape, and a very large percentage of young men belong in jail. Laws that sweeping are out of touch with social norms and cannot be enforced, except selectively—and, indeed, statutory rape laws are.

Unable to prosecute the whole country, law enforcement officials apply the law principally against two groups: men, frequently older, who have sex with girls from "good homes"; and minority men, who are punished if they commit the crime of having sex with white women or impregnate a woman of color under circumstances that add to the welfare rolls.

Amending the laws, as some legislators want to do, so that they would apply with special force to men who have sex with women five or more years younger would help, but only a little: Prosecutors cannot possibly charge in every case of a 16-year-old girl who has sex with her 21-year-old boyfriend.

The laws would continue to be used as weapons to punish men who are politically unpopular, socially unacceptable, of the wrong color, or who make the mis-



BY RICHARD DELGADO

Such laws are one of the worst ideas that the family-values crowd has produced in years.

take of having intercourse with a woman from a socially upstanding (and well-connected) family. These laws, then, uphold old notions of chastity and virginity, while providing a weapon against men from social groups we do not like.

They also deprive women in their mid- and late teens of choice under the guise of protecting that choice. In this respect, they are the modern descendants of Victorian and late medieval laws punishing the crime of seduction, which were used to protect noble families against the loss of a property right in their daughters' marriageability.

Punishments for pressured sex and sex with the very young—and even hardcore pornography, which glorifies and encourages brutal sex and rape—are socially imperative, and the same is true for sexual harassment in the workplace and elsewhere. But overbroad statutory rape laws are one of the worst ideas that the family-values crowd has produced in years.

Women rarely are charged for sex with younger men. This is perhaps as it should be—men and women stand on very different footings with respect to physical and social power. But this relative scarcity of reverse-enforcement cases should cause us to ask deeper questions: What is rape? What is consent? When is intercourse pressured, and when is it an expression of love between two autonomous individuals?

These are all important questions. But mechanistic laws, which contain overtones of Puritanism, can only impede us in addressing these matters. They are both paternalistic and patriarchal, and should be firmly resisted.